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THE TESTIMONY

—OF—

MEDICAL EXPERTS.

ANNUAL ADDRESS

—OF—

W. H. PHILIPS, M. D.,

KENTON, O.,

RETIRING PRESIDENT OHIO STATE MEDICAL SOCIETY.

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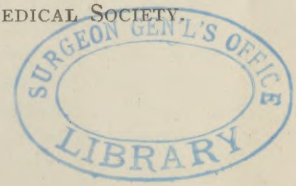

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It will be remembered that at the last session of this Society, the subject of Medical Experts was referred to a special committee, of which I was made the responsible head. It has seemed to me not inappropriate to introduce this subject upon the present occasion, discussing it in its relation to the people generally, and to the medical profession in particular.

If we look to the origin of government, it will be found that the family preceded it, under the leadership of a patriarch or chief. The interests of families came into conflict, and it became necessary for those whose interests were similar to combine for purposes of defense. To prevent anarchy, those thus uniting were compelled to form a national body, upon which such powers were conferred as tended to give security to the interests of all. In necesity government thus had its origin, the object of its formation being to give security to the individual and to everything that is dear to him. Differences have arisen among men as to the best means of obtaining this security; and from these differences have sprung the various forms of government. But whatever form may approximate nearest to

perfection, certain it is, that the security, which the individual has, is directly proportionate to the fact, whether his government is good or bad. The whole is made up of parts. As are the parts so is the whole. Government consists of various departments. According as these departments are managed, the whole is managed; and according as the whole is managed, the security which the citizen has is good or bad.

It is the department of Justice with which we now have to deal, considering it merely with reference to those cases, wherein, for the proper investigation of truth, it is necessary to call in the testimony of medical experts. No other department comes so near home to the citizen as this. A few see the workings of the other departments, but the great majority are totally unacquainted with them except by hearsay. Their workings affect the people as a whole, and not as individuals. They seem far off, and their effects, though powerful, are mostly indirect and not easily described in their action. With the courts it is different. There is not a citizen in the land who does not come in contact with their operations. It is here that he is punished, that his wrongs are redressed, and his rights obtained. He is affected as an individual. He sees and hears for himself the causes by which effects are wrought upon his life, his liberty, his property, or his reputation. The fact need scarcely be pointed out that where such important interests are at stake, the instrumentalities employed in securing justice should be as perfect as possible. The great progress which has been made in the last century in judicial science abundantly attests the general appreciation of this fact by the English and American people. The matter of medical expert testimony furnishes, however, an exception. In this a conservatism has been displayed which evinces either a marvelous confidence in the infallible wisdom of their ancestors who founded the present methods of procedure, or a neglect utterly at variance with the radical and reformatory ideas of the nation.

Let us glance for a moment at the origin of our coroner and expert system. The office of the former is very ancient, having been instituted long before Medical Jurisprudence was known in England. He was originally of high rank, served without compensation, and was appointed for life. In the 16th century, when Medical Jurisprudence

first came to be taught in England, the character of the office had changed: fees were paid, and all classes of society were made eligible, the occupants were corrupt, and justice was neglected. Medical Jurisprudence itself was in a very crude state. Barbers and surgeons performed the same duties; physicians were prophets, astrologers and sorcerers; the superstition of the age forbade medico-legal antopsies; almost complete ignorance existed of either morbid or normal anatomy; chemical mysteries remained uninvestigated; the standard works of the time contain chapters on Ghosts, Torture, Witchcraft, Miracles, Sorcery, Prophecy, Demonology and the like; experts testified learnedly as to the bleeding caused by the murderer approaching the body of his victim, while Judges, like Sir Matthew Hale, declared that 'there were such creatures as witches he made no doubt at all; for first the Scriptures had affirmed so much; secondly, the wisdom of all nations had provided laws against such persons, which is an argument of their belief in such a crime.' In this case the jury found the defendants guilty, and on the judge's sentence they were executed. Asylums for the insane were unknown. They were regarded as brutes devoid of all sensibility; were farmed out as slaves, and chained like beasts in stables and pens.

Laws, it would seem, were scarcely needed to apply such principles as these in judicial investigations. Still such a system of laws did exist, the same which we inherited from our English ancestors, and have preserved unchanged even to the present day. But whilst the laws applying to it have remained stationary, medical jurisprudence, being a progressive science, has gone steadily forward, until now, in hundreds and hundreds of the cases that arise, our courts are powerless to do justice without an intelligent application of its principles. Scientific research has lifted the vail of ignorance and superstition which so long obscured it. Witchcraft and sorcery are things of the past. The mysteries of chemistry have been revealed, and from its rich stores contributions have been made to almost every science. Anatomy has been developed in all its branches. Medico-legal antopsies have come to be recognized as essential to justice. The diagnostics of diseases have been noted and recorded. By the aid of the stethoscope, thermometer and microscope, the problems of life

and death stand almost solved. The insane have ceased to be regarded as "children of the evil one," and are now the wards of the State, while comfortable houses have replaced the barns and pens in which they were once kept, and mercy and sympathy now stand in the place formerly occupied by brutality and contempt.

There arise annually in the United States not less than twenty thousand civil and criminal cases in which it is necessary to apply the principles of this science. Medical experts are called to testify as to the causes of disease, the effects of wounds, the state of a person's mind, the effects and symptoms of poisons, the results to be apprehended from a particular treatment, the likelihood of death occurring from certain causes, as to marks, burns, strains, signs, appearances, as to the determination of real or apparent death, as to questions of a sexual bearing, as to identity, age, legitimacy, survivorship, punishment, and questions of a like nature. These cases generally involve the most important interests in life. As a learned jurist has observed:

"Life, fortune, reputation, friendship and happiness may depend upon the testimony of the medical expert. How responsible the position where interests of such vast importance to the parties and to society hang upon a single word that may fall from the lips of fallible man. With what care should the witness measure his words and adjust his language, so that the jury will not misunderstand him, or be misled by an unguarded expression. The position is responsible indeed, and should drive the ignorant pretender to medical knowledge to call upon the rocks and mountains to hide his shame and cover him up forever from the sight of his Maker and the eyes of his fellow mortals."

The magnitude of the matters at stake shows the necessity of having highly intelligent and skilled experts to investigate these questions properly. In so far as the protection of the citizen in his rights is a matter of State concern, provisions for securing competent experts in these cases are also of State concern. Not one of our States has recognized this fact. On the contrary, they have utterly neglected to adopt a code of laws which would secure a rational application of medical science to judicial injuries. Supply follows demand. It is the duty of the State to

furnish a demand for competent experts. This has not been done, and hence the reason why medical jurisprudence has been so much neglected in our medical schools.

It is no easy matter to determine who are experts in a given case, and who are not. Perhaps the best rule yet laid down for making this determination is that of Wharton: "The non-expert testifies as to conclusions which may be verified by the adjudicating tribunal; the expert to conclusions which cannot be verified. The non-expert gives the result of a process of reasoning familiar to every day life; the expert gives the results of a process of reasoning which can be mastered only by special scientists." But who, under our law, is to decide whether the process of reasoning, required in a given case, is "familiar to every day life," or can be "mastered only by special scientists?" The coroner or judge must decide. They may be men of intelligence and education, but not in one case out of a hundred have they that special knowledge of medical, surgical and psychological science which is needed in order to a proper performance of this duty. Notwithstanding, the law entrusts to them the examination of the expert's competency and the formation of a judgment thereon. But how in the nature of things can this be done? All judgments are based on relations. The judgment as to the expert's competency must be founded on the relation between the special knowledge of the expert and the special knowledge of the coroner or judge. If the coroner or judge has no such knowledge, he can form no correct judgment as to the expert's competency. Hence the custom which has grown up of admitting any one to testify as an expert who will certify as to his own special knowledge, without any attempt being made to discover in what that special knowledge consists.

A quack and a physician may be called to testify as experts. The quack, equipped with brazen impudence and ever ready to advertise his acquaintance, not only with the special subject whose principles it is desired to apply, but with all other subjects, lays down, *ex-cathedra*, as it were, certain fictitious principles as true; and as neither coroner nor judge knows anything to the contrary, he receives all the credit due to the competent medical expert. The physician, on the other hand, painfully aware of the absurd confusion of the office of expert with the office of physi-

cian, knowing the immense scope of medical science, and the utter impracticability of one man acquiring special skill in all its branches, assured that his training as a physician has not fitted him to do justice, as a competent expert, in medical jurisprudence, either to himself or to the parties concerned in the case, perhaps hesitates, is uncertain, or frankly confesses his ignorance. As neither coroner, judge nor jury are able to determine the cause thereof, they are apt, generally, to judge him incompetent, and to give his testimony little or no weight. Thus, under present legal rules, is quackery exalted, justice trifled with, and the reputation of the highest physician injured. One result of leaving the choice of competent experts with those who are incompetent to distinguish between experts and non-experts, has been the establishment of the legal and popular presumption that every physician is, by virtue of his profession, a medico-legist, and therefore competent to testify as an expert in regard to all the special branches of medical jurisprudence. The same presumption attaches to all kinds of experts. Thus in New Jersey, a physician, not an oculist, has been admitted to testify as to diseases of the eye; in North Carolina, physicians, not veterinary surgeons, as to diseases of mules; in New York and Alabama, other persons, not veterinary surgeons, as to diseases of animals; in New York, a physician, not a chemist, as to whether certain stains are apparently blood; in California and Iowa, a witness, not a chemist, as to the effects of a powder in removing ink spots; in Louisiana, a person, not a surgeon, to prove that a death was caused by wounds; in Alabama, a witness, who had frequently drank fermented liquors, and is able to distinguish them by their taste, although not having any special knowledge of chemistry, as to whether a certain liquor which he has tasted is or is not fermented.

Properly speaking, medico-legists only are medical experts. A man may be the leading physician of his State, and yet not be competent for such an office. It requires a special training, which the State, as the guardian of the people and the dispenser of justice, should provide. This duty she neglects to fulfill, employing in its stead the presumption referred to. Hence it is that reproaches have often been unjustly heaped upon the medical profession; because they did not do as no reasonable man could expect

them to do. Hence it is that the testimony of experts has fallen into disrepute, because the law provides no means of winnowing the chaff from the grain.

This confusion between the office of expert and physician has long been to the profession a matter of annoyance and chagrin. But this feeling approaches one of outrage when we consider how often physicians are forced to attend court to the utter neglect of their business, and for no further compensation than the pitiful pittance paid as a fee to the ordinary witness. The justice of this practice has always been denied. In three cases out of four, where its legality has been tested, courts of higher resort have held that the State, as well as the individual, must pay the physician a full equivalent for his scientific opinions. "*Salus populi, suprema lex*," was the governmental maxim of the Romans. It is equally applicable to us, in that the safety of the people being the primary object of government, all laws should tend to secure that end. The supreme law of our State declares that private property shall ever remain inviolate, subject to the right inherent in every sovereignty to appropriate such property to public uses, upon just and adequate compensation. In many cases, private rights must be sacrificed to the public weal. A private inconvenience must be endured, rather than a public mischief. If the public good demand it, the services, property, or even life of the citizen may be employed for its protection. But closely attendant upon this governmental right, is the reciprocal duty of making full compensation to the citizen whose interests have been affected. It is a duty enjoined by our constitution; it is founded in natural equity; it is laid down by jurists as a principle of universal law. Property is varied in its character. It may be corporeal or incorporeal, tangible or intangible. It may exist in the form of land, in a right or privilege, in the ideas found in a book, or flitting along the electric wire, or in a peculiar knowledge or skill. A son inherits a sum of money. He may become a money lender, and convert his money into evidences of debt. These are his property. He may invest his money in real estate. This is his property. He may employ it in educating his brains. The peculiar skill or knowledge arising from that education is just as much his property as the land or notes. The law recognizes this fact in the case of lawyers, referees,

master commissioners, and the like. An attorney is assigned to defend a criminal, and receives proper compensation therefor. So with the referee and commissioner; they receive value for their special services.

The relation of the medical expert to the court is exactly analogous. Yet, with one exception, there is not a statute, decision, or legal custom in force in our State under which he receives any more for his services than does the ordinary witness. The one exception referred to is a statute passed in 1861, providing compensation to physicians and surgeons for making post-mortem examinations, and which, owing to the manner in which this compensation is to be computed, is a standing insult to the dignity of the medical profession. Under this enactment, the coroner or other officer, at whose motion the examination is made, is obliged to keep account of the time during which the physician is at work, and the nature of the operation performed. Upon his report of these facts, the court determines the amount of compensation. In other words, the value of the expert's services are to be judged of by one who is generally totally unfitted by education to form any judgment thereon; and he is to be paid like the day-laborer, according to the time employed.

A distinction has been made between "ordinary" and "skilled" witnesses. Persons testifying as to the facts come under the first head; medical experts and experts generally under the second. When called on to testify as an ordinary witness, the physician admits it his duty to testify in the same manner, and for the same compensation, as any other citizen. But when called on to give his professional opinions, he denies the applicability of the word *witness* to him at all. It is a word in whose meaning is implied a personal attendance upon, a direct cognizance of the facts. The medical expert has had neither. He stands like the attorney or referee, a *pro tem.* officer of the court. His relation is that of an adviser, an arbitrator, or assistant. His opinions are intended as simple advice, to influence the judgment of the court. But whatever be his relation to the judge, certain it is that his special knowledge is his stock in trade, the product of his labor, the capital upon which he speculates, the source from which he draws his livelihood. Like all capital, however, in order to be profitable it must be kept in constant use, and at the

proper place. If the physician is carried away from his business and kept in attendance upon the courts, this constant use is stopped, his special knowledge is taken from the place where it might have been profitably used, and he is injured according to the value of that use during the time he has been deprived of it. Our constitution says that the citizen shall not be thus deprived of his property without adequate compensation; and there is but little reason to doubt but that, if a test case arise, our Supreme Court would hold, as that of Indiana has just done, that the special knowledge of the physician is his property, and the State must pay for it or leave it alone.

Leaving these two topics, the method of determining who are experts, and the amount of compensation, let us look at other branches of the subject. Medical experts are often called to assist at inquests. To assist whom? The coroner,—a man who ought properly to be a person of intelligence, thoroughly versed in medical jurisprudence, and elected, or better, appointed for life, in order to become acquainted with his duties and relieved of political influences. But who is he in fact? With rare exceptions, a man without medical, legal, in many instances without literary, education; owing his office to political favor, and subject to its influences; his compensation small; unacquainted with the duties; in every way unfit for his important office. As Dr. Beck has expressed it, in his work on Medical Jurisprudence: "The duties of his office are imperfectly understood, and often most negligently performed. * * * The individuals appointed are often unfit for the situation, both from habit and education."

These are the men, who, under the Anglo-American mode of practice, determine who are experts, to whom physicians often have the pleasure of standing in the relation of assistants; by whom their opinions are weighed, accepted or rejected; and who gather together the important facts in the case, upon which to form a basis for the opinions of experts in the higher courts. Inasmuch as an ignorant or incompetent man is apt to look for assistants among his own kind, nothing but accident will generally prevent an inquest from being presided over by an incompetent coroner, aided by a corps of incompetent assistants. Accurate medico-legal autopsies are essential to justice in

many cases. There are many signs, marks, and circumstances connected with a dead body, or the scene of an affray or other crime, which in themselves are sufficient to identify the criminal, or to designate the cause of various effects. These evidences may be very delicate, and an experienced eye required to observe them. In a short time they disappear, and the means of detection are lost forever. Elwell, in his work on Malpractice and Medical Evidence, observes on this point, that "when the coroner does not detect the perpetrator of a homicide, in most cases he is not detected at all. When a crime has just occurred, there is more interest felt and wakefulness exercised than afterward. The body of the deceased is fresh; the opportunities of scientific examination are usually perfect, much more so than after disorganization has destroyed the structure of the body. Those who saw the victim last and the circumstances surrounding him are present. The witnesses have not yet been tampered with. * * * If the guilty party is followed up immediately, with sharp, quick strokes, the chances of arriving at the truth are greatly increased."

These facts show the significance of the coroner's inquest. Furthermore, they show the necessity of a change in the present system which will relieve it of its deformities; which will place in charge of these investigations men who are competent to make them, to select proper assistants when needed, and to testify to the facts if the case is carried into the courts.

The method of applying expert testimony in civil and criminal trials is no better than at the inquest. Nominally the judge is to determine who are experts. But the same difficulty meets us as in the case of the coroner. Skilled in the law they may be; but judges are not necessarily, or even commonly, acquainted with the principles of Medical Jurisprudence. In consequence, what is known as the "voluntary system" of experts has grown up. The parties are allowed to summon whom they please to testify in their favor. Neither party summons a witness whose testimony he is not certain will aid his side of the case. The experts found in our courts are therefore men of pre-ascertained views, brought into court because they are advocates of some particular theory which is needed to sustain the complaint or defense. Hence it is that in al-

most all our criminal trials experts are found swearing positively and directly contrary to one another. In the Stokes-Fisk case, for example, experts were equally in opinion as to whether the deceased died from the effects of the wounds, or the manner in which the ball was extracted. In the Wharton-Ketchum case, experts swore positively as to the presence of poison in sufficient quantity to produce death; whilst others were equally certain that there was not a trace or symptom of poisoning.

A striking illustration of the Ciceronian maxim, that "there is no theory so absurd but that some expert may be found to maintain it," was exhibited in the Superior Court of New York in 1872. The case involved the right to use a bull's head as a trade-mark upon boxes of mustard. One of the most eminent chemists in the city, on being called as an expert, testified that, by personal experiment, he knew that mustard contained eleven per cent. of starch. Professor Chandler of Columbia College, on being called by the opposite party to rebut this evidence, denied that mustard contained any starch at all. The case then went to the jury. The expert first called was not satisfied however, and he applied to the presiding judge for permission to make his experiments in the presence of the court. Leave was granted. The mustard was ground in a mortar, placed in distilled water and heated over a lamp. The solution was then poured on filtering paper, the chemical test for starch was applied, and the result was a deep blue coloring, which seemed to demonstrate, without question, the presence of a considerable amount. Professor Chandler, on being recalled, expressed dissatisfaction over the first experiment. At his suggestion the chemical test was applied to a sheet of paper entirely free from the solution of mustard. The same blue color characteristic of starch was again exhibited; thus showing that the starch was not in the mustard, but in the paper upon which the experiment was performed.

In addition to the serious conflict of authority, always sure to arise, wealth and self-interest are also significant factors in this system. If experts, with views which will sustain the peculiar theory set forth in a party's complaint or answer, are not to be found in the vicinage, wealth, with its long-reaching arms, can send for them where they

are to be found ; whilst poverty, in its weakness, is obliged to rely for assistance upon incompetence or chance.

Life and liberty are the dearest of man's possessions. In the case of the criminal it is these that are at stake. His property, his own best exertions, the influence of friends, all stand ready to aid him in securing means of defense. Hence it is that eminent experts so often appear for the defense in criminal trials. Notwithstanding these experts stand alone in the advocacy of some extravagant idea, they are often able to impose this idea upon the court as the expression of sound scientific opinion. The prosecution does not feel the impetus that moves the defense. He often neglects to provide competent experts to use in rebuttal. Sometimes he is surprised. But the law itself impedes him still more. A rigid cross-examination of the empyric as to the opinions of other men, known to be true scientists, might expose the imposition ; this the law forbids. The opinions of competent experts might be taken by deposition; this the law does not allow. Finally, even if the prosecution do send for competent experts, the law furnishes no means with which to make proper compensation for services and expenses.

It will be noted that these *bizarre* theorists, called to sustain some unique principle of defense, are not only now chosen on account of their pre-ascertained views, but they are also paid by the party calling them to advocate these views. Your attention has already been called to the relation which medical experts bear to the court. They are witnesses in no proper sense, but are in truth medico-legal advisors, whose office is to aid the court in determining what particular scientific principles are law in a given case. Then, if it be bribery to pay a judge to decide that certain false principles are law, how much less is it bribery to pay them for their services whose duty it is to assist the court in forming that decision!

It is a legal principle that opinions of experts must be founded on science, and that mere theories are inadmissible in evidence. Upon the judge rests the duty of harmonizing the opposing views of experts, of weighing their testimony, of rejecting speculative theories, and of informing the jury of the scientific principles which they shall recognize in making up their verdict. But how can our judges properly perform this duty, without special training in

medical jurisprudence? He who would produce harmony must know what harmony is. In order to harmonize the opinions of medical experts, he must himself be a medical expert. In order to weigh their opinions, he must have a standard in his own brain by which to estimate this weight. Not one judge in a hundred has this knowledge, this standard, by which to judge the opinions of others upon a special science. The science of medical jurisprudence is progressive, not exact. What was regarded as theory yesterday, is regarded as science to-day. What is science in the judgment of some, is theory in the judgment of others. The judge who declares what is theory, declares what is not science. He who knows what is not science, must know what science is. Judges, however, do not possess this knowledge. They are not medical scientists. Hence the gross absurdity of entrusting them with the duty of weighing medical opinions, and of determining real from speculative science.

Under a practice like this, whereby such advantages are enjoyed by wealth, whereby no provision is made to obtain the true sense of the great body of experts, whereby experts hired by the parties are allowed to advise the court as to the opinion which should be formed—no two cases can arise, however similar in fact and circumstance, in which the same principle of medical jurisprudence will be applied to each case. The determination of this principle will always depend upon three ever-varying elements: 1st, upon the character and standing of the experts summoned for the defense; 2d, upon the ability of the experts whom the prosecution has been able to subpœna; and 3d, upon the competence of the judge to harmonize opposing opinions. But, even supposing these elements constant in the two cases, it is in most cases impossible for even a competent expert to give a just and accurate opinion, owing to the rule of legal evidence which requires the facts, upon which the opinion is based, to be presented to him in a hypothetical form, by attorneys who are interested in suppressing material facts, or who are ignorant of the facts necessary to be presented in order to the formation of an intelligent and satisfactory opinion.

Both medical and legal professions could not fail to be dissatisfied with a system so barbarous in its conception, so unjust in its consequences. Prof. Chaille, speaking for the medical

profession, declares that "with the power of medical science crippled at the coroner's inquest, then prostituted by the partisan opinions of incompetent experts, then perverted by advocates, and at last, when emasculated of all vigor, submitted for decision to those unable to estimate its weight—what wonder that such gross misapplication of medical knowledge brings upon it that public contempt which belongs justly to methods so monstrous, and to which true medical knowledge is a helpless, pitiable and disgusted victim."

Lord Campbell says, "that skilled witnesses came with such a bias on their minds to support the cause in which they are embarked, that hardly any weight should be given to their evidence."

Chief-Justice Chapman, of Massachusetts, observes: "I think the opinions of experts are not so highly regarded now as they formerly were; for, while they often afford great aid in determining facts, it often happens that experts can be found to testify to anything however absurd."

Judge Davis, of Maine, goes even farther: "If there is any kind of testimony that is not only of no value, but even worse than that, it is, in my opinion, that of medical experts."

Judge Redfield, of Vermont, also remarks that there is "but one opinion as to the fact that this kind of testimony is extremely unsatisfactory. * * * We are more and more confirmed in our opinion, that the difficulty comes largely from the manner in which witnesses are selected. * * * If the State, or the courts, do not esteem the matter of sufficient importance to justify the appointment of public officers, * * * * it is certain the parties must employ their own agents to do it, and it is perhaps almost equally certain, that, if it be done in this mode, it will produce two well-trained bands of witnesses, in battle array against each other, since neither party is bound to produce, or will be likely to produce, * * * witnesses who will not confirm their views."

It was this opinion existing in the two professions which led to the founding in 1867 of the Medico-Legal Society of New York, an organization worthy of imitation in other States. The object of this Society is to assist in remedying the evils of our present mode of practice, to create intelligent public opinion upon the subject, and to supply,

in so far as it can, the omissions of State legislation. It now numbers between four and five hundred distinguished physicians and lawyers, and owns one of the finest medico-legal libraries in existence. Much has been already done to improve the laws of New York in regard to experts. Its labors, if properly carried on, will doubtless eventually result in a procedure founded on justice and intelligence.

England originated the voluntary system, and she and her colonial offspring have had a monopoly of its absurdities.

Under the Roman law a system somewhat similar prevailed. The parties were allowed to call experts at their own option. But if the judge was not satisfied with the testimony, he could call experts (*artis pariti*) to testify impartially, in regard to such physical laws and natural phenomena as he was not sufficiently acquainted with to properly weigh the evidence produced by the contending parties. The canon law appears to have recognized a similar practice. The civil law became the law of France. But, unlike ourselves, the French failed to recognize the infallibility of their ancestors. The importance of competent and impartial expert testimony in judicial investigations was perceived at an early day. Legislation was had in the Sixteenth Century, encouraging the teaching of medical jurisprudence. But not even the courts escaped the reign of corruption that attended upon the Bourbon rule. At the time of the French Revolution, the office of medical expert had become venal and hereditary. Since then, France has been most liberal in the encouragement of medico-legal science. Under the present practice, the voluntary element is totally eliminated. The judge, only, has authority to summon experts. None are competent, save those who have attended at least one course of lectures on medical jurisprudence, and have passed a rigid examination. Thus do they aim at avoiding incompetency and obtaining impartiality. Such a method of procedure is far in advance of our own. Yet it is bitterly criticised and denounced by the French themselves, on the ground that their judges are incompetent to make proper selections; that they are apt to give preference to their family physicians, and to practitioners of mere popular repute; and, on what is perhaps a better ground, that official patronage is a thing entirely inconsistent with the judicial office.

We must turn for the model system to that of Prussia. Two centuries and more ago, what is now a great and prosperous Empire comprised a lot of insignificant little States. The master mind of the Prussian King conceived the idea of gradually uniting them under one great head, that would lend strength and dignity to all. The rapid fall of all governments based on force, convinced him of the utter futility of employing that element for his purpose. He determined that this new Empire should be founded on intelligence which should be thoroughly infused among the people and into every branch of governmental service. The verification of the German status is now complete. In the midst of great calamities and trials, by long years of hard work, under administrations economical to parsimony, he and his successors have developed an educational system, which for half a century has won the admiration of the world by its intellectual conquests, and which, in the past ten years, has aroused the world's wonder by its political and social triumphs.

In Germany alone has medical jurisprudence received a proper estimate of its worth. It was introduced into the German Universities at their foundation, and made a part of medical education. The expert was made a government officer, holding his position because of his peculiar skill and fitness. The present organization is the result of continuous legislation upon the subject since the early part of the 16th century. It consists entirely of medico-legal officials, and is divided into four divisions. The County Physician and County Surgeon constitute the first, the County Tribunal. They are required by law to be thoroughly educated in medicine, surgery, and obstetrics, and to have a special training in medical jurisprudence. This training is certified to by examinations before a Supreme Medical Commission. The duties of the County Tribunal are two-fold. It is incumbent on them to investigate all medico-legal questions referred to them by the courts. They also perform the duties which in this country are performed by the coroner. Their appointment is continuous, and they owe it to neither party, but to the State. They make personal investigation of the facts in every case. Power is given them to take testimony. They may call experts as counsel if they wish, but these experts must have certificates, received from State examinations, of

their skill in the specialty whose principles it is desired to apply. The facts and proofs, and the conclusions arrived at by the expert tribunal, are then shaped into a written report, which is carefully preserved along with the report of the subsequent proceedings had. So far as the court making the reference is concerned, this report is conclusive; but the physician and surgeon may disagree, or the parties interested may be dissatisfied. To meet these cases, an appeal is made to the second division of this organization. This division consists of a medical commission of from four to six members, and is somewhat analogous to our district courts. One such commission exists in every province. If dissatisfaction exists with the decision of this tribunal, an appeal lies to the third division. This is the Supreme Medical Commission, comprising men of national reputation. In the fourth division we find the Minister of Medical and Sanitary Affairs, who presides over the entire department of State medicine.

We may demonstrate the difference between the two systems by an illustration: Suppose a criminal case in which moral insanity is set up as a defense. Under the American practice, the expert gives his opinion as to there being such a thing as moral insanity. The judge determines the degree of responsibility in one who is morally insane. The jury return a verdict as the fact whether the prisoner is insane or not. In other words, the expert advises the court as to the major premise of the syllogism. The jury find the minor premise. The judge draws the conclusion, For example, the expert says: "It is my opinion that there is such a thing as moral insanity." If the judge is satisfied with this opinion, and also thinks that moral insanity will free a criminal from responsibility for his acts, he lays down the major premise thus:

"All criminals morally insane are not responsible for their acts, and should be discharged."

The jury then lay down the minor premise in this manner:

"The criminal undergoing prosecution is (or is not) morally insane."

The judge then draws the conclusion:

"The prisoner is (or is not) discharged."

If either is wrong, the conclusion must be wrong. But, as has been before pointed out, it is impossible for the

jury to determine the fact, or the judge to determine the degree of responsibility resulting from the fact, unless they have become acquainted with the nature and phenomena of moral insanity through that study and observation which one or the other are sure not to have made. The Germans have escaped this absurdity by leaving the determination of both major and minor premise, the determination of scientific principles and scientific facts, to those who have made scientific principles and scientific facts a life-long study. To the judge is left only the drawing of the conclusion from premises prepared by the scientific tribunal—a duty which any one acquainted with the simplest rules of logic can perform.

Critics, having in mind the old conflict in England between the law and equity jurisdictions, may anticipate such another with the expert tribunals. But in practice this has not arisen; nor is it likely to arise, any more than conflict is likely to arise between courts and referees or master commissioners, or between legislative bodies and their committees. Science is the limited sphere in which the expert tribunal must move. Without, its acts would be a nullity; within, the courts have hitherto done little more than injustice. If a strong feeling is growing up against the determination longer of scientific questions by tribunals totally unqualified for the purpose, and to whose procedure antiquity and custom alone lend any dignity, there can be but little doubt but that if scientific tribunals were to innovate by assuming to meddle with questions of law and ordinary fact, which in the nature of things they were unfit to pass upon, national conservatism and public convenience would afford an impassible barrier to such an assumption.

Such an organization as that of Germany recognizes the duty of government to employ every instrumentality that will secure justice to the citizen. It recognizes the full importance of the skilled and competent expert in judicial inquiries. It recognizes the fact that experts stand to the court in the relation of assistants. It therefore denies, to those who are interested, the choice of these assistants. The educational requirement renders the expert competent. His appointment by the State ought to render him impartial. His own knowledge will enable him to select competent assistants, and to properly determine the weight of

evidence. The right of appeal furnishes ample security against injustice or mistake. Delays may be caused, it is true, but justice can afford to move slowly so long as it moves with certainty. Besides, it will be but a few years before all the main questions that can arise will be settled and precedents recorded in medico-legal reports. Judicial proceedings will thus be shortened, and a uniformity obtained in the decisions of subordinate tribunals, which will more than compensate for temporary delays.

The absurdities of the American method of procedure render its reform imperative. The only effective reform is to build anew. Its voluntary character should be taken away and itself made part of the machinery of government. When our State makes the demand, our medical schools will furnish an ample supply of competent medical experts. The change may be expensive, but there can be nothing more expensive than the injustice wrought by the methods now in use. Medical officers should be officers of the government, as are the judges whom they assist. They should be appointed for life, in order to secure impartiality. They should be rigidly examined, that competent men may be obtained. They should be well compensated, that men of ability may be induced to occupy the office. There should be a right of appeal, that mistakes may be corrected. The duties of coroner should be performed by men specially trained for the purpose.

If our government should consider the science of medical jurisprudence and its application to judicial investigations of sufficient importance to justify the establishment of a Department of State Medicine, these, to my mind, are some of the principles upon which it should be built. In such an event, we might expect to see the medical profession freed from the unjust reproaches which have so often been heaped upon it, and the testimony of medical experts rescued from the disrepute into which it has now fallen. Then might we look upon the true medical expert as he has been ideally painted—he who vindicates truth by contributing to the ends of justice, who is disembarrassed of all personal relations, who has no client to serve and no past partisan extravagances to defend, who will render his opinion as the advocate neither of another nor of himself; but who can speak as the representative of the sense of the special branch of science which the case invokes.

REPORT OF COMMITTEE UPON COMPENSATION OF MEDICAL EXPERTS.

The committee to whom was referred the subject of "Compensation for Services rendered by Medical Experts," have considered the same, and beg leave to report—

1st. We find it to be a custom generally prevailing thoroughout our country, to employ the sovereign power of our State, through its judicial machinery, to order the attendance of physicians and surgeons upon the trial of criminal and civil cases, there to hear testimony and to give counsel and instruction upon such medico-legal questions as may arise in the case.

2d. We find there are no laws upon our statute books to provide for a proper compensation for such services. With but a single unimportant exception, the law provides only for fees for ordinary witnesses.

3d. The manifest injustice to medical experts, growing out of this neglected legislation, has seemed to justify the acceptance of a suitable fee, compensating in some degree for the loss of time and business, the expense and the value of the service rendered by the medical expert from the parties litigant or their attorneys. Hence the origin, and the apparent equity, of what may now be considered the established usage.

4th. This results in bringing into the courts, voluntarily, two sets of witnesses, each impliedly under contract to render his best service in the interest of the party by whom he is paid.

This naturally, and in the opinion of your committee very properly, tends to bring medical experts into disrepute, to degrade the high character which their proper office should command, and in many cases to subvert the ends of justice.

We submit that such legislation and such customs are in their very nature subversive of the very objects for which they were instituted, and ought to be speedily abolished, and a new system created which shall be based upon principles of equity and of justice to all concerned.

In the opinion of your committee the State should provide for the employment of a sufficient number of medical experts, whose competency should be secured by such rigid examination as would place their qualifications beyond question; whose impartiality and independence shall be secured by appointment for life; who should be officers of the State, as are the judges whom they assist. They should be well compensated, that men of ability may be induced to accept the position. There should be a right of appeal, that mistakes might be corrected and true science vindicated. There should be a department of State medicine, organized and put under their care, which, if properly managed, would secure to our people a return in value of tenfold the cost of such a system.

These radical reforms cannot be accomplished by a single spasmodic effort; they must come as the growth of years and experience.

In the meantime we would commend to such members of the medical profession as may be called upon to serve as medical experts, to decline any and all offers of compensation from parties litigant in advance, but to render such service as may be required, after which to make out and present for the approval of the court a bill for services rendered, based upon considerations of the value of the services, the time spent, and such other considerates as are usual in estimating the value of professional services.

These bills would in a large majority of cases be approved by the court, and taxed and collected as are other costs. This is the method by which the legal profession is compensated by the courts for services rendered as referees or master commissioners, and it has often been resorted to in the case of medical experts.

Your committee would recommend the organization of a large committee, consisting of one or more members in each county in the State, whose duty it should be to take charge of the proposed reform, to secure the repeal of the present system and the building up of a new one upon its ruins, and especially to educate and secure an interest in the coming legislature upon this subject.

Respectfully submitted,

W. H. PHILIPS,
C. P. LANDON.